

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

February 12, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 2000-203
	:	A.C. No. 36-06990-03526
HARRIMAN COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On August 7, 2000, the Commission received from Harriman Coal Corporation (“Harriman”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Harriman’s motion for relief.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Harriman, through counsel, asserts that the late filing of its hearing request to contest the proposed penalty assessment was due to unfamiliarity with Commission rules and procedure. Mot. at 2. Harriman contends that it understood that the proposed assessment became final after 30 days, but that it did not understand that the final order would be non-appealable. *Id.* According to Harriman, it did not receive notice that the proposed assessment became a final action until it received a delinquency notice from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on July 28, 2000, which noted that the proposed assessment became final on July 14, 2000, and that the final action could not be appealed to the Commission

or otherwise reviewed. *Id.* Harriman notes that it has promptly filed its request to reopen less than one week after receiving the notice of finality and that given the severity of the proposed assessment, it would be prejudiced by not having an opportunity for a hearing to contest the proposed assessment. *Id.* at 3-4. Harriman requests relief under Fed. R. Civ. P. 60(b)(1). *Id.* at 4. Attached to its motion is an affidavit of Ronald Lickman, president of Harriman; a Notice of Contest for filing, in the event the Commission grants its request to reopen; the proposed assessment; and the delinquency notice. Exs.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *See, eg., Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat'l Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

The undisputed assertions of Harriman indicate that the operator believed it would have the opportunity to appeal the proposed penalty assessment when it became a final order. Ex. 1 at 2. Under the circumstances presented here, Harriman's late filing of a hearing request could be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Peabody Coal Co.*, 19 FMSHRC at 1614-15 (reopening final order when party failed to submit hearing request due to unfamiliarity with Commission procedure). We further note that Harriman acted promptly to rectify its mistake once it discovered it, filing its motion for relief on August 3, just a few days after it received a delinquency notice on July 28 which alerted it to its mistake. *See Augusta Fiberglass Coatings v. Fodor Contracting*, 843 F.2d 808, 812 (4th Cir. 1988) (denial of 60(b) relief reversed by court of appeals in case where defendant's attorney failed to file an answer, with court emphasizing that defendant "showing awakened speed . . . moved for relief within two weeks of the entry of the judgment, well within the rule's one-year limit.").

We recognize that Harriman has been represented by counsel in this proceeding. However, the Commission has previously awarded relief in cases in which an operator represented by an attorney has failed to file in accordance with the time limits of our procedural rules. *See Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (reopening final order and finding sufficient allegation that counsel misinterpreted deadline for filing petition for discretionary review); *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982) (granting operator's request for permission to file late-filed petition for discretionary review when operator's prior counsel had failed to file one).

Accordingly, in the interest of justice, we grant Harriman's unopposed request for relief, reopen this penalty assessment that became a final order, accept for filing Harriman's Notice of Contest, and remand this case to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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Mary Lu Jordan, Chairman

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Harriman's position and would remand the matter for assignment to a judge to determine whether Harriman has met the criteria for relief under Rule 60(b). *See Dean Heywood Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to judge to determine whether asserted lack of familiarity with Commission procedures met criteria for relief under Rule 60(b)); *M&Y Servs., Inc.*, 19 FMSHRC 670, 671 (Apr. 1997) (remanding when proposed penalty became final because operator was unfamiliar with procedures for requesting hearing); *REB Enters., Inc.*, 18 FMSHRC 311, 312-13 (Mar. 1996) (remanding where failure to file answer was claimed to be based upon lack of familiarity with Commission rules and procedures). I also note that, unlike the operators and individuals involved in the above-mentioned cases, Harriman was apparently represented by counsel at the time that it delayed filing its hearing request to contest the proposed penalty assessment based upon its asserted unfamiliarity with Commission rules and procedure.

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Robert H. Beatty, Jr., Commissioner

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